NOT INCLUDED
IN BOUND VOLUMES

MHJ
Jersey City, NJ

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BIO-MEDICAL APPLICATIONS OF NEW JERSEY, INC. d/b/a BIO-MEDICAL APPLICATIONS OF JERSEY CITY, INC.
Employer

Case 22-RD-114233

and

COLLIS BRIAN ALEXIS
Petitioner

and

DISTRICT 1199J, NUHHCE, AFSCME, AFL-CIO
Intervenor

DECISION AND DIRECTION OF SECOND ELECTION

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on November 7, 2013, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 15 for and 13 against the Union, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs and, for the reasons set forth below, has adopted the hearing officer's findings[1] and recommendations[2] and finds that the election must be set aside and a new election held.

[1] The Intervenor has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.,* 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

In its Objection 1, the Employer alleges that the Intervenor interfered with employee free choice by demanding the discharge of the Petitioner, employee Collis Brian Alexis, for alleged nonpayment of dues and initiation fees. For the reasons that follow, we agree with the hearing officer's recommendation that Objection 1 be sustained.[3]

On October 10 and 11, 2013, the Union sent Alexis letters claiming that he owed $666.30 in unpaid dues and initiation fees and that under the applicable collective-bargaining agreement he was subject to discharge if he failed to tender the required dues and fees within 20 days. Neither letter explained how the Union had calculated Alexis's alleged arrearage. It is undisputed that the calculation was inaccurate and that Alexis in fact had paid dues for at least some portion of the time he was employed.[4] A copy of the October 11 letter was posted in the employee lunchroom.[5]

Also on October 11, the Union sent the Employer a letter stating that Alexis was in violation of the union-security article and that the Union's records showed he had not paid any initiation fee or dues since he was hired. The letter stated: "As per Article II-Union Security, [we are] requesting that Mr. Alexis be discharged effective October 31, 2013."

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[2] In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the Employer's Objection 3 and the portion of Objection 4 regarding Union Vice-President Richard Morreale's alleged use of profanity while referring to one of the Employer's managers.

[3] Member Johnson agrees that Objection 1 should be sustained and that the election should be set aside. He, accordingly, finds it unnecessary to pass on Objection 2 and Objection 4.

[4] According to Alexis, he also was on medical leave for part of the time for which the Union claimed he owed dues and therefore did not owe dues for that period.

[5] We adopt the hearing officer's finding that the letter was posted. We do not rely on his further finding that the Union was responsible for the posting.

On October 25, Union Vice President Richard Morreale and Administrative Organizer Alexie Hall met with unit employees at the Employer's facility. At that meeting, the Union disseminated the threat to have Alexis discharged to at least three other employees. Hall and Morreale also stated that they wanted Alexis and employee Chi Chi Walker to work for the Union and would like to offer positions to them. On October 30, after the Employer challenged the legality of the Union's discharge request, particularly the calculations of the amount of money Alexis allegedly owed, the Union withdrew its demand for Alexis's discharge. The Union did not, however, inform any unit employee other than Alexis of this action.

In evaluating party conduct during the critical period, the Board applies an objective standard under which conduct is found to be objectionable if it reasonably tends to interfere with employee free choice. *Cedars-Sinai Medical Center,* 342 NLRB 596, 597 (2004). In applying this standard, the Board considers (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining-unit employees; (6) the extent of dissemination of the misconduct among bargaining-unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; (9) the degree to which the misconduct can be attributed to the party. Id.

Here, the Union threatened to cause the discharge of the decertification petitioner less than a month before the election. Under the contractual union-security clause, the

Union had the power to cause employees' discharge for nonpayment of dues, and the threat to do so was likely to cause fear among employees, including Alexis, that their failure to support the Union could jeopardize their employment. See *Lowndes County Health Services, Inc.,* 325 NLRB 250, 251 (1997) (threat of discharge is highly coercive and one of the most serious forms of election misconduct). The Union disseminated the threat to three other unit employees, a significant number given that a one-vote swing would have changed the outcome of the election.

We agree with the hearing officer that it is "beyond dispute" that the Union may lawfully enforce its contractual union-security rights during the critical period prior to an election. In this case, however, the demand for Alexis's discharge was not justifiable as a valid effort to enforce the contractual union-security clause. To the contrary, the Union's claim that Alexis was delinquent in dues and initiation fees was inaccurate and unsubstantiated. Cf. *Teamsters Local 122,* 203 NLRB 1041, 1042 (1973) (union unlawfully caused discharge of employees for nonpayment of dues where it back-credited recent payments to earlier months in which no payments had been made but failed to explain this procedure to the employees), enfd. 502 F.2d 1160 (1st Cir. 1974); see generally *Philadelphia Sheraton Corp.,* 136 NLRB 888 (1962), enfd. sub nom. *NLRB v. Hotel Employees Local 568,* 320 F.2d 254 (3d Cir. 1963).[6] The Union's offer to Alexis of a position, whether as an employee of the Union or as an unpaid delegate (which would have required that Alexis remain an employee), further suggested that his

[6] Under the circumstances outlined above, we find objectionable the Union's unjustified threat to cause Alexis's discharge. We do not pass on the hearing officer's implicit determination that because the Union took no action against other employees who apparently were delinquent in their dues, the enforcement of the union-security clause against Alexis was discriminatory.

continued employment depended on his supporting the Union in the election.[7] Although the Union withdrew its demand for Alexis's discharge on October 30, that fact was not disseminated to any other unit employee.

According to the Union, it acted in good faith when it demanded Alexis's discharge based on the information in its possession at the time. Even assuming it did, however, good faith is not a defense when a union fails to satisfy its fiduciary duty in the enforcement of a union-security agreement. *Teamsters Local 162 v. NLRB,* 568 F.2d 665, 669 (9th Cir. 1978) (where actual notice of delinquency not accomplished, good-faith effort to provide notice insufficient, even though employer was responsible for union's inability to provide notice), enfg. 224 NLRB 1477 (1976). Moreover, the existence of good faith on the part of the Union would not affect the reasonable tendency of its conduct to interfere with employee free choice. See *Lake Mary Health Care Associates, LLC,* 345 NLRB 544, 545 (2005) ("In determining whether conduct is objectionable, the Board does not inquire whether [a party's] actions were intentional or actually affected the results of the election.").

In sum, the Union threatened to cause the discharge of decertification petitioner Alexis a month before the election, and the threat was disseminated to three other employees. The threat was expressly linked to Alexis's failure to support the Union by paying dues and initiation fees, and it was not a valid attempt to enforce the Union's contractual union-security rights. Given the severity of this incident, the extent of dissemination, the closeness of the election, and the Union's failure to effectively

[7] We do not, however, find the offer was independently objectionable, because the Employer has failed to establish that the Union offered Alexis something of "tangible economic value as an inducement to win support in a representation election." *Go Ahead North America*, 357 NLRB No. 18 (2011). Accordingly, we overrule Employer Objection 2.

disseminate its withdrawal of the threat, we find that the Union's conduct reasonably tended to interfere with employee free choice in this election. Accordingly, we will set aside the results of the election and direct a second election.[8]

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the election directed herein and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since

[8] We overrule the remaining objections unaddressed thus far. Employer Objection 4 alleges, in part, that the Union engaged in objectionable conduct when Hall implored voters to support the Union by asserting, apparently in jest, that she would lose her job if the Union was decertified. Such appeals are not objectionable, any more than it would be objectionable for a union to predict that unit employees will lose their own jobs if the union loses the election. See *Underwriters Laboratories, Inc.,* 323 NLRB 300 (1997) (union representative did not interfere with employee free choice by telling employees they would lose their jobs if they voted against representation), enfd. 147 F.3d 1048 (9th Cir. 1998). Hall also appealed to Alexis to support the Union based on their shared Jamaican heritage. The hearing officer appears to have considered this appeal to be objectionable, as part of either Objection 1 or Objection 4. We disagree. See, e.g., *Bancroft Mfg. Co.,* 210 NLRB 1007 (1974) (finding unobjectionable union organizer's remark to employees that if blacks did not stick together and union lost, all the blacks would be fired), enfd. 516 F.2d 436 (5th Cir. 1975), cert. denied 424 U.S. 914 (1976). We do not rely on either of these appeals as grounds for setting aside the election.

the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the date of the election directed herein, and employees engaged in an economic strike that began more than 12 months before the date of the election directed herein and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by District 1199J, NUHHCE, AFSCME, AFL-CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C., April 29, 2015.

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Philip A. Miscimarra, Member

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Kent Y. Hirozawa, Member

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Harry I. Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD